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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 310

ALABAMA MILLS, INC., ET AL., *Petitioners*

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The petitioners, Alabama Mills, Inc., American & Efird Mills, Inc., Arkwright Mills, Balston Yarn Mills, Inc., Caldwell Cotton Mills Co., Carlton Yarn Mills, Inc., Carolina Mills, Inc., Carolinian Mills, Inc., Chesnee Mills, Clifton Manufacturing Co., Coats & Clark, Inc., The Dunson Mills, Eastman Cotton Mills, Fairforest Company, Gastonia Combed Yarn Corp., Gem Yarn Mills Co., Globe Mills Co., Graniteville Company, Harden Spinning Co., Henry River Mills, Inc., Imperial Yarn Mills, Inc., Irene Mills, Jefferson

Mills, Inc., Jewel Cotton Mills, Inc., Lanett Bleachery & Dye Works, Micolas Cotton Mills, Mills Mill, Monroe Mills Co., Mooresville Mills, National Yarn Mills, Inc., Naumkeag Steam Cotton Co., Opp Cotton Mills, Inc., Park Yarn Mills Co., Peerless Spinning Corp., Pepperell Manufacturing Co., Piedmont Cotton Mills, Riegel Textile Corp., A. M. Smyre Manufacturing Co., Spartan Mills, J. P. Stevens & Co., Inc., Stowe Spinning Co., Superior Yarn Mills, Inc., Textiles Incorporated, Thomaston Cotton Mills, Threads, Inc., Trenton Cotton Mills, United Spinners Corp., U. S. Rubber Co., Weldon Mills, Inc., Wellington Mills, West Point Manufacturing Co., and Worth Spinning Co., respectfully pray that a writ of certiorari be issued to the United States Court of Appeals for the District of Columbia Circuit, to the end that this Court may review a judgment which the said Court of Appeals rendered on April 26, 1957, in the above entitled cause, designated in said Court of Appeals as case No. 13,597.

OPINIONS OF THE COURTS BELOW AND OF THE SECRETARY OF LABOR

The opinion of the Court of Appeals is reported at 244 Fed. 2d 21 and appears hereinafter as Appendix A.

Opinions rendered by the District Court, upon motion for preliminary injunction (unreported) and upon the original motions for summary judgment (reported at 129 Fed. Supp. 740), appear hereinafter as Appendix B.

The opinions of the Court of Appeals on the former appeal, reversing the original judgment of the District Court and remanding the cause for further proceedings (reported at 229 Fed. 2d 506) appear hereinafter as Appendix C.

The opinions and decision of the Secretary of Labor (reported in 17 Fed. Reg. 11197, and 18 Fed. Reg. 471) appear hereinafter in Appendix D.

The judgment of the District Court, entered June 13, 1956, and the judgment of affirmance in the Court of Appeals appear hereinafter in Appendix E.

JURISDICTION

The judgment of the Court of Appeals, which Petitioners seek to have this Court review, was rendered on April 26, 1957. Transcript of Record, p. 315.

Jurisdiction in this Court to review the judgment of the Court of Appeals, through the issuance of a writ of certiorari, is established by Title 28, U. S. Code, Section 1254.

QUESTIONS PRESENTED

1. Does the Secretary of Labor have authority, under Section 1 of the Walsh-Healey Public Contracts Act of 1936 (41 U. S. C. §35(b)) to determine and prescribe, for all work on Government contracts in a given industry, a single, uniform and Nation-wide minimum wage, in the face of the statutory language which provides for a determination of "the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating *in the locality in which the materials, supplies articles or equipment are to be manufactured or furnished* . . . "? (emphasis supplied)

2. Does the Secretary of Labor have authority, under Section 1 of the Walsh-Healey Public Contracts Act of 1936 (41 U.S.C. § 35(b)), to determine and pre-

scribe a single, uniform and Nation-wide minimum wage for persons employed in the manufacturing or furnishing of the products of the Cotton, Silk, and Synthetic Textile Branch of the Textile Industry under contracts subject to the Walsh-Healey Public Contracts Act, where it is undisputed that minimum wages widely vary in such industry, and in the face of the statutory language which provides for a determination of "the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating *in the locality in which the materials, supplies, articles or equipment are to be manufactured or furnished . . .*"? (emphasis supplied)

STATUTES INVOLVED

Section 1 of the Public Contracts Act of 1936, generally known as the "Walsh-Healey Act," 49 Stat. 2036, 41 U.S.C. § 35(b):

> "In any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:
>
> * * *
>
> "(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, with-

out subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;"

Section 10 of the Public Contracts Act of 1936, adopted by amendment on June 30, 1952, generally known as the "Fulbright Amendment", 66 Stat. 308, 41 U.S.C. § 43a:

"Sec. 10. (a) Notwithstanding any provision of section 4 of the Administrative Procedure Act, such Act shall be applicable in the administration of sections 1 to 5 and 7 to 9 of this Act.

"(b) All wage determinations under section 1(b) of this Act shall be made on the record after opportunity for a hearing. Review of any such wage determination, or of the applicability of any such wage determination, may be had within ninety days after such determination is made, in the manner provided in section 10 of the Administrative Procedure Act by any person adversely affected or aggrieved thereby, who shall be deemed to include any manufacturer of, or regular dealer in, materials, supplies, articles or equipment purchased or to be purchased by the Government from any source, who is in any industry to which such wage determination is applicable.

"(c) Notwithstanding the inclusion of any stipulations required by any provision of this Act in any contract subject to this Act, any interested person shall have the right of judicial review of any legal question which might otherwise be raised, including, but not limited to, wage determinations and the interpretation of the terms

'locality', 'regular dealer', 'manufacturer' and 'open market'."

Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 1009:

"Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

"(a) Right of review.

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"(b) Form and venue of action.

The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

"(c) Reviewable acts.

Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection

whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

"(d) Interim relief.

Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

"(e) Scope of review.

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency

hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

STATEMENT OF THE CASE

This is a civil action for review of a minimum wage determination under the above quoted "Fulbright Amendment" to the Walsh-Healey Public Contracts Act. For a full understanding of the nature of the proceeding, reference to the statute and its history is essential.

Under the above quoted section 1(b) of the Walsh Healey Act, adopted in 1936, contracts with the United States or its agencies, for the manufacture or furnishing of materials in any amount exceeding $10,000, must include a stipulation that all persons employed by the contractor in the manufacture or furnishing of the materials will be paid "not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;". The *locality* of manufacture or furnishing is thus made an integral part of the standard of prevailing minimum wage to be determined by the Secretary.

Until 1952, there was no requirement in the statute for a hearing or any other formal proceeding for "de-

termination" of minimum wages by the Secretary of Labor. The procedural safeguards of section 4 of the Administrative Procedure Act (5 U.S.C. § 1003), adopted in 1946, were specifically inapplicable to "any matter relating . . . to public . . . contracts." Wage determinations were held to be immune from judicial review in *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940). The action of the Secretary of Labor in making wage determinations was, during this period, subject only to disciplines and procedures imposed within the Executive Department. It was not a matter which could be controlled at the suit of any private party, as to whom the power of the Secretary was absolute.

In 1952, Congress provided for both procedure and review. On June 30, 1952, the Walsh-Healey Act was amended by the addition of a new section 10 (66 Stat. 308), quoted in full above. By subsection (a) all of the procedures and safeguards of the Administrative Procedure Act (5 U.S.C. 1001-1011) were made applicable in the administration of the Walsh-Healey Act. By subsection (b) "all wage determinations" were required to be made "on the record after opportunity for a hearing" and were made subject to review under section 10 of the Administrative Procedure Act (5 U.S.C. § 1009), also above quoted in full. This section provides in paragraph (b) for review of agency action in suits for declaratory judgment or injunction. Under paragraph (e) the reviewing Court shall hold unlawful and set aside agency action, findings, and conclusions found to be in excess of statutory jurisdiction, authority or limitations.

The new section 10 of the Walsh-Healey Act further provided that judicial review of a wage determination

could be had by any person adversely affected or aggrieved thereby, "who shall be deemed to include any manufacturer of, or regular dealer in, materials, supplies, articles or equipment purchased or to be purchased by the Government from any source, who is in any industry to which such wage determination is applicable."

With this amendment, the Walsh-Healey Act became something new and quite different from the statute of only internal concern to the Executive Department, construed in 1940 in *Perkins* v. *Lukens Steel Co.*, *supra*.

On July 26, 1952, less than a month after enactment of the Fulbright Amendment, the Secretary of Labor gave public notice of a hearing on prevailing minimum wages in the textile industry (17 Fed. Reg. 687), and a hearing was held on September 3, 4 and 5, 1952. See post, Appendix D, pp. 24a-25a. On December 15, 1952, the Secretary issued a "Notice of Proposed Amendment to the Determination of the Prevailing Minimum Wage for the Textile Industry", in which he discussed the "locality" limitation of his authority and concluded that he was not prevented from establishing a nationwide minimum wage for the textile industry. See post, Appendix D, pp. 32a-37a.

Exceptions were filed and overruled, and with a minor modification, not here material, the Secretary made his order, providing that:

> "(1) The Minimum wage for persons employed in the manufacturing or furnishing of the products of the Cotton, Silk, and Synthetic Textile Branch of the Textile Industry under contracts subject to the Walsh-Healey Public Contracts Act

shall be $1.00 an hour arrived at either on a time or piece-rate basis."

This wage determination was dated January 15, 1953, effective February 21, 1953. See post, Appendix D, pp. 57a-62a.

The Secretary made no effort to determine the prevailing minimum wage in any "locality" of manufacture, having taken the view that the statute did not prevent his adopting the entire United States as the area for a uniform prevailing minimum wage.

This civil action was commenced on February 11, 1953, in the United States District Court for the District of Columbia, by seventy textile manufacturing companies, all of whom were in the industry to which the wage determination was applicable, as provided by the Fulbright Amendment. The complaint recited the wage determination and challenged its validity on a number of grounds, principally however on the ground that the Secretary of Labor had disregarded the statutory limitation on his authority with respect to localities (86-93).[1]

After a full hearing on February 16 and 17, 1953, the District Court on February 20th made findings of fact and conclusions of law (125-126), and entered a stay and preliminary injunction against the wage determination (127-8),[2] the District Court having "very

[1] References hereinafter are to pages of the Joint Appendix, copies of which are submitted with this petition, unless otherwise noted specifically.

[2] Although the joint appendix shows a caption for the case of *Covington Mills* v. *Durkin* (125), the instant case was consolidated in the District Court with that civil action and identical findings, conclusions and temporary injunction were entered in both cases (128).

grave doubts that the aforesaid amended wage determination was arrived at agreeably to the requirement of the statute." See post, Appendix B, pp. 2a-4a.

Pursuant to an order of the District Court (94-95), one hundred and thirty additional plaintiffs were added (99-101). Thereafter, during the course of the proceedings in the District Court, the complaint was dismissed and the injunction dissolved as to forty-eight plaintiffs, largely through voluntary action by these plaintiffs. (106-107) One hundred and fifty-two plaintiffs continued the action.[3]

After extensive discovery through interrogatories, the Secretary of Labor conceded that fourteen of the plaintiffs had a standing to sue, but challenged the standing of all of the others on various grounds (239-246), without in any way questioning the fact that they were in the industry to which the wage determination applied, which is the criterion for standing to sue established by the Fulbright Amendment. The Secretary filed a motion to dismiss the action as to all those whose standing was challenged and for summary judgment upholding the wage determination as to the fourteen or any others whose standing might be upheld (239-240). Plaintiffs filed a cross motion for summary judgment (247).

The District Court granted summary judgment for plaintiffs and declared the minimum wage determination "to be unlawful and invalid as in contravention of

[3] The disparity between the numbers appearing above and in the record (or in the concurring opinion in the Court of Appeals) is explained by the fact that six plaintiffs in the Covington Mills case were then before the court and are not involved in the Alabama Mills case, which alone is the subject of this petition.

the statute under which it purported to have been issued" (275).

The opinion of the District Court (Post, Appendix B, pp. 4a-8a) was that "locality" phrase of the statute limited the power of the Secretary of Labor in making his wage determinations, and that the country as a whole could not be treated as one single "locality". Since some of the plaintiffs were conceded to have standing to bring the suit under the Fulbright Amendment, the District Court set aside the wage determination, and declined to pass on the standing of those whose right to appear in the action had been challenged.

On appeal, the Court of Appeals for the District of Columbia Circuit reversed, with dissent, the majority holding being that the Secretary of Labor was not limited to any geographical area less than the nation in extent (Post, Appendix C, pp. 9a-15a), thus in effect reading out of the statute the locality provision. The Court of Appeals also held that the District Court had erred in not passing on the standing to sue of those plaintiffs, whose position in court had been challenged. The cause was remanded with instructions to the District Court to rule on the motion to dismiss filed by the Secretary "unless the government withdraws it or the plaintiffs concerned consent to it." (Post, Appendix C, p. 15a)

Rehearing was thereafter denied by the Court of Appeals sitting in banc, with two judges dissenting, and certiorari was denied by this Court. *Covington Mills, v. Mitchell*, 350 U.S. 1002.

At the time of the previous application for certiorari, the opinion and judgment of the Court of Appeals had left open for further proceedings in the District Court the important question of the standing to sue of many

of the plaintiffs, and the petition was evidently premature. *Hamilton-Brown Shoe Co.* vs. *Wolf Bros & Co.*, 240 U.S. 251, 258; ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, section 308;[4] STERN & GRESSMAN, SUPREME COURT PRACTICE, 2d Ed., P. 130.

Thereafter, the cause was remanded to the District Court. Plaintiffs filed a motion for a ruling on the standing to sue of each of their number pursuant to the appellate mandate. (277) The Secretary of Labor then withdrew his motion to dismiss (277-8), thus conceding that all plaintiffs had standing in the civil action to challenge the wage determination. Thereupon the District Court entered a judgment in favor of the Secretary of Labor upholding his wage determination, pursuant to the Opinion of the Court of Appeals. (Post, Appendix E, pp. 63a-64a)

This judgment, disposing of all matters left open by the Court of Appeals as to the proceedings for determination of the validity of the Secretary's action, was then appealed and affirmed, again with dissent. (Post,

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[4] ". . . Power exists in the Supreme Court to issue the writ whether the judgment or decree of the Circuit Court of Appeals is or is not a final disposition of the controversy. But the Court has repeatedly said (especially in its earlier decisions) that 'except in extraordinary cases, the writ is not issued until final decree,' and has warned that the circumstance that the decision of the Circuit Court of Appeals is not a final one is 'a fact that of itself alone furnished sufficient ground for the denial of the application.' It has pointed out that on certiorari to review a final decree of a Circuit Court of Appeals it can reach back to correct errors occurring in the interlocutory proceedings, and that neither the failure of parties to apply for certiorari to review an interlocutory ruling nor the denial by the Court of an application made at that stage affects the right to issue the writ to review the final decision of the Court below, nor the scope of review on such writ."

Appendix A, p. 1a and Appendix E, p. 65a) On this second appeal, the Court of Appeals declined to decide the case without briefs or argument and declined to hear the case en banc. Order entered January 8, 1957, Transcript of Record, p. 280. Later, on a motion to advance the cause for hearing, the Court in its order declined to hear before the panel any argument on matters decided by the prior appeal, "without prejudice to the filing of a petition for original hearing en banc within ten days since if any argument is desired on such a question it should be before the full court." Order entered March 11, 1957, Transcript of Record, p. 299. Pursuant to this suggestion, a petition for hearing en banc was filed but was denied. Order entered March 29, 1957, Transcript of Record, p. 312. The case was thereupon submitted and the judgment of the District Court affirmed per curiam on April 26, 1957.

REASONS FOR ALLOWANCE OF WRIT

This case presents "an important question of federal law which has not been, but should be, settled by this court."[5] The regulation of wages and hours of employees is accomplished by the United States Government through two major channels: by the control of contracts for the manufacture or furnishing of materials to the government under the Walsh-Healey Act,[6] and by exercise of the interstate commerce power under the Fair Labor Standards Act.[7] The two methods are not mutually exclusive and may apply to the same operation. *Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497, 515-520.

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[5] Rule of 19 of this Court.

[6] 49 Stat. 2036, 41 U.S.C. § 35 et seq.

[7] 52 Stat. 1060, 29 U.S.C. § 201 et seq.

With the vast extent of government operations and procurement of materials, a great volume of commercial and industrial activity is subject to the controls of the Walsh-Healey Act. The correct interpretation of the wage provision in Section 1(b) of this Act quoted above, is of incalculable importance to the nation at large.

The section, when read in its natural, unstrained, plain, and obvious meaning, creates a standard of minimum wages measured by the prevailing wages "in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract." "Locality" permeates and controls the meaning of the entire section and the quoted phrase would be entirely superfluous, if Congress had intended to prescribe a single standard of "prevailing" minimum wages for industries across the country, without reference to local standards.

In *Powell* v. *U.S. Cartridge Co.*, supra, this court said in outlining the statute:

> "The Walsh-Healey Act was adopted about one year after the National Industrial Recovery Act had been declared unconstitutional. *Schechter Corp.* v. *United States*, 295 U.S. 495. Seeking then to regulate wages and hours of employees, the Walsh-Healey Act kept within a narrow field of assured constitutionality. It prescribed that, in Government contracts for the manufacture or furnishing of materials, supplies, articles and equipment in any amount exceeding $10,000, the contractor pay its employees not less than the minimum wages determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work in the locality. * * * (339 U.S. at 513)

The Secretary of Labor and the Court of Appeals were clearly in error when they held that minimum wages "for similar work" or for a particular industry need not be related to the prevailing standard in a local community. (Post, Appendix D and Appendix C).

The legislative history hereinafter described shows that Congress intended the Act to be construed with reference to local communities of the country.

The administrative "practice" of the Secretary of Labor in ignoring the "locality" limitation, relied on by the Court of Appeals majority, far from being an administrative interpretation of an ambiguous statute, entitled to weight, is rather an evasion of both the spirit and the letter of the law. "Where a statutory body has assumed a power plainly not granted, no amount of such interpretation is binding upon the Courts." *Texas and Pacific Railway Co.* v. *United States*, 289 U.S. 627, 640 (1933).

Nor has there been Congressional acquiescence in the Secretary's view. On the contrary, when Congress in 1952 passed the Fulbright Amendment and made the Secretary subject to judicial review, rather than spell out his duty by detailed definition, the Senate Committee said:[8]

> "Your committee considered, and rejected, a proposal to change the word 'locality,' in section 1 (b) of the act, to 'city, town, village, or other civil subdivision' (similar to the language in the Davis-Bacon Act), which was subsequently modified to read 'local labor market area,' in order to include workers in a normal commuting area surrounding

[8] S. Rep. No. 1399, 82d Cong., 2d Sess. 31 (1952).

> the place of manufacture, and avoid the artificial boundaries of a city, town, or county. It is the intent of your committee that its action in rejecting this proposal be without prejudice to future deliberations of the courts concerning the meaning of 'locality.'"

This can hardly be called acquiescence or acceptance by Congress of the Secretary's views. By contrast, in the case cited by the Court of Appeals majority, *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 17, Congress had *specifically* approved administrative regulations interpreting the statute.

The fallacies of the majority opinion in the Court of Appeals, and the reasons for the allowance of the writ are set forth with the utmost clarity and conviction in the dissenting opinion of Judge George Washington on the first appeal, to which he adhered in dissenting from the judgment now submitted for review by this Court (See Appendix C, pp. 19a-21a, and Appendix A.)

Previous Applications for Review

A determination of minimum wages, under the Walsh-Healey Act, in the steel industry, for a large region extending through fourteen states, was reviewed by the District of Columbia Court of Appeals in *Lukens Steel Co.* v. *Perkins*, 107 Fed. 2d 627 (1939). The opinion made an exhaustive study of the legislative history and of the meaning of "locality" and came to the conclusion that the Secretary of Labor had exceeded his power in stretching the word to include so large an area. As the dissenting opinion states in this case (Appendix C, post, p. 19a):

> "The reasoning of the opinion seems to me unanswerable. And the legislative history there recited shows with complete clarity what Congress intended: that bidders for Government contracts 'shall pay the prevailing wages in the community where the work is performed.'"

Certiorari was granted (309 U.S. 643), in view of "the manifestly far-reaching importance of the questions thus raised" by the Court of Appeals decision (310 U.S. at 125).

As above stated, the Walsh-Healey Act required no special procedure to be followed by the Secretary and provided for no review at the suit of private parties. The Secretary's function was merely executive, in aid of the procurement policies of the government, invading no rights of private industry. This Court therefore reversed the Court of Appeals on the ground that the plaintiffs in that case had no standing to sue. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940).

The Fulbright Amendment modified the law by requiring special procedure in arriving at wage determinations, by allowing judicial review, and by defining those who have the right to seek such review. In view of this legislative change in the doctrine of *Perkins* v. *Lukens Steel Co., supra*, it is of importance that any pending issues, as to the standing of parties under the amendment, be fully adjudicated by the courts below, before presenting the case for review by this Court.

Certiorari was denied on the earlier appeal in this case, at a time when the judgment of the Court of Appeals had remanded the cause to the District Court for a decision on the standing of nearly all of the plaintiffs, and when no such decision had yet been made.

350 U.S. 1002, sub. nom. *Covington Mills* v. *Mitchell. In Allendale Co.* v. *Mitchell,* No. 755 Oct. Term 1955, 351 U.S. 909, a petition for certiorari was likewise denied when presented at a premature stage. In a civil action for review of a nation-wide wage determination for the Woolen and Worsted Industry, decision had been made by the District Court on the standing to sue of the plaintiffs and an appeal had been taken. The petition for certiorari was filed, however, *before judgment in the Court of Appeals,* and this Court did not have the benefit of a ruling in the Court of Appeals on the "standing to sue" issue raised by the Secretary of Labor.

Respondents will doubtless say that the questions presented in this case have been previously disposed of in the denial of certiorari in those two instances. Petitioners apprehend, however, that both petitions were made at premature postures of the respective cases.[9] Upon remand in this case, Respondent Secretary of Labor disposed of the issue on standing to sue by withdrawing the motion to dismiss (217-218). Judgment on the merits was then entered as to all plaintiffs and has been affirmed by the Court of Appeals (Appendix A, post).

The cause is therefore now in a posture where this court may review it on the issue which was not reached in *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113. Petitioners respectfully urge the granting of certiorari, in view of the equally "far-reaching importance" of the questions raised.

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[9] See authorities cited above at p. 14 and in footnote 4.

This Cause Is Not Moot as to Petitioners

The minimum wage prescribed by the Secretary of Labor for the textile industry under the Walsh-Healey Act was $1 per hour (Appendix D, post). Effective March 1, 1956, Congress amended the Fair Labor Standards Act so as to increase the national minimum wage from 75 cents to the same amount of $1 per hour. 69 Stat. 711. While the Respondents have not asserted, and the Secretary of Labor has even disclaimed any intention of asserting, that this cause is thereby rendered moot, it seems appropriate to eliminate any possible implication of mootness.

During the pendency of the injunctions entered by the District Court, and prior to March 1, 1956, employees of some of the plaintiffs in the case received wages less than $1 per hour in the performance of contracts subject to the Walsh-Healey Act. In view of the injunctions, only the earlier minimum of 87 cents per hour was enforceable. Through voluntary disclosure, investigations by government agents in the field, and conferences of attorneys representing the Secretary and the plaintiffs respectively, the amounts involved have been reviewed and will be in the aggregate about $420,000. See affidavit in Transcript of Record, pp. 293-295. Against each and every one of the Petitioners named in this petition, the Secretary asserts a claim on behalf of employees, and the question of liability thereon may depend on the outcome of this petition.[10] All of those plaintiffs against which the

[10] Pleadings are yet to be filed for adjudication of Petitioners' liability on the injunction bonds or otherwise, but the Secretary's attorneys have expressed their intention of asserting the claims, and Petitioners' attorneys their intention of defending on whatever grounds may be available, including the defense that the imposition of liability would be inequitable under all of the circumstances of the case. Bonds on file aggregate over $500,000.

Secretary does not, as the result of the disclosures and investigations, assert any such claim have been omitted as petitioners herein.

The cause is therefore not moot, and the final adjudication of the merits as to the extent of the Secretary's power in making wage determinations in this case is readily seen to be a true "case or controversy" within the meaning of Article III, section 2, of the Constitution.

Legislative History

The Walsh-Healey Act grew out of two bills, S. 3055, 74th Cong., 1st Sess. and H.R. 11554, 74th Cong., 2nd Sess., on which, "extensive hearings" were held by the House Judiciary Committee. These bills gave the Secretary of Labor very wide discretion to prescribe uniform minimum wages over the country substantially as he might see fit.

They evoked voluminous and vigorous protest, that vested with authority to require uniform industry-wide minimum wage levels in broad areas, or indeed over the whole Nation, the Secretary would deprive many small manufacturers outside the large industrial centers of all opportunity to obtain Government contracts and would thereby increase the centralization of industry and the monopolization of Government business by the large corporations. It was stressed that there was great need to "encourage" small manufacturing establishments throughout the country; that "should wage differentials be entirely excluded . . . thousands of small manufacturers would be eliminated in bidding"; and that it was inevitable and indeed salutary that there should be variation in wage scales "in different parts

of the country and in communities of different size, with varying conditions.[11]

The result was that neither of these bills was reported out by the House Committee. Instead, an entirely new bill was written, which the Secretary has aptly described as a "compromise" of "the different views expressed during the hearings." This new bill[12] was adopted after debate by the house, and by the Senate without debate, and became known as the Walsh-Healey Act.

The sponsors of this bill, in presenting it to Congress, were emphatic and unanimous:[13]

> Mr. Greenwood: "Mr. Speaker, this resolution from the Committee on Rules provides for consideration of what was known as the Walsh-Healey Bill, which Bill regulates specifications in connection with the purchase of supplies by the Government of the United States. It provides that no less than *the prevailing minimum wage* shall be paid to workers *in the Community where the supplies are manufactured or where the work is performed.* . . . The Government in buying its supplies should lead the way . . . and should provide a *minimum wage according to the scale prevailing in the community.* . . . This Bill provides that they (contractors for Government work) shall pay *the*

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[11] H. R. hearings on S. 3055, 74th Cong., 1st Sess., pp. 58, 63, 87, 88, 91, 94, 95, 393, 397, 440.

H. R. hearings on H. R. 11554, 74th Cong., 2nd Sess., pp. 237, 239, 245, 249, 250, 251, 391, 302-304, 309, 313, 393, 402-412, 422-436, 440.

[12] Identified as an amendment of and substitute for S. 3055.

[13] Unless otherwise indicated, italics, for emphasis, are petitioners'.

prevailing wages in the community where the work is performed. . . ."[14]

Mr. Healey: "This Bill does not set the standand for minimum wages by reference to the codes that obtained under N. R. A., but definitely sets it as the prevailing minimum wage for similar work or in the industries operating *in the locality in which the contract is to be performed.*"[15]

Mr. Citron: "The Bill merely provides that the Government shall have the right to refuse the bids on all purchases over $10,000 to those . . . who pay less than the prevailing rate of wages *in their community. . . .*"[16]

Mr. Ayers: "This Bill also provides for prevailing wages *in the locality where the work is done.*"[17]

Mr. Mischener: "It permits the Secretary of Labor, Madam Perkins, to determine what the prevailing minimum wages are *in the locality in which the materials are to be manufactured or furnished.*"[18]

Mr. Sirovich: "The Walsh-Healey Bill make it mandatory for all agencies that deal with the United States Government to accept the prevailing wages *in the respective localities* in which the materials, supplies, articles or equipment are to be manufactured or furnished under said contract[19] . . . The minimum wage law in this Bill can fix wages *depending upon what the local com-*

[14] 80 Cong. Rec. 9992-9993.

[15] 80 Cong. Rec. 10002.

[16] 80 Cong. Rec. 10008.

[17] 80 Cong. Rec. 9286.

[18] 80 Cong. Rec. 10006.

[19] 80 Cong. Rec. 10012.

munity in that particular section where the contract is taken pays for similar work."[20]

Congressman Healey, upon being asked whether "the real purpose of the Bill" was to empower the Secretary of Labor to set wages "throughout the country", exclaimed "Oh, no".[21] And Senator Walsh, in offering an amendment to the Act a year after its enactment, said:

> "It is evident that the legislative intent of the present minimum wage section was to direct the administrative authority to give effect to geographic differentials."[22]

From all of which it is abundantly clear that Congress specifically understood and emphatically intended that minimum wage determinations under the Statute which they were enacting should be made by localities and not on any uniform nation-wide basis.

The Limited Purpose of the Walsh-Healey Act

In the present case, not even purporting to determine and prescribe for the various localities of the textile industry "what the prevailing minimum wages are in the locality" or "the scale prevailing in the community"—the Secretary of Labor has instead declared and decreed one uniform and Nation-wide minimum wage for the entire industry.[23] In this he flatly disobeyed the "locality" restriction which Congress advisedly,

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[20] 80 Cong. Rec. 10015.

[21] Hearings on H. R. 11554, 74th Cong., 2nd Sess., pp. 124-125.

[22] 80 Cong. Rec. 3503-3504.

[23] It is undisputed that minimum wages in the textile industry are in fact not uniform but are characterized by a variety of geographic differentials. (160-162, 211-214)

deliberately and pointedly wrote into the Act. And the opinion of the majority below overrides the language of the Statute and totally ignores its legislative history to sustain the Secretary's action.

The reasoning of the opinion is that if manufacturers are allowed to perform Government contracts at the wages which the Secretary finds to be prevailing in their respective localities, then some Government business will go to manufacturers in the lower wage-paying localities and the objective of eliminating such manufacturers from Government business will not have been fully accomplished. "Only an industry-wide minimum", says the majority, can fully accomplish this purpose.

But the majority assumes the whole case when it assumes that in the Walsh-Healey Act Congress intended *fully* to accomplish such purpose. The vital point of the case is that the Walsh-Healey Act *does not go the whole way* toward requiring uniformity of wages among those who compete for Government business.

Both the language and the history of the Act set forth a middle-ground position in which Congress went part of the way, but not all the way, toward requiring uniform wages—not creating authority to compel all manufacturers in an industry to conform to a single standard, and not leaving them free to pay wages as low as they might see fit either—but creating instead authority to compel them, if they desire Government business, to come up to and maintain the prevailing wage levels of their respective localities.

It is of course true that in enacting this legislation Congress was concerned with the problem of Govern-

ment business going to "firms that pay sub-standard wages".[24] But the question at the heart of the case is: —"sub-standard" by what standard? Both the language and the history of the Act answer this question clearly:—that a manufacturer may not have Government business if his wages are sub-standard in relation to the wage level which prevails in his locality.[25]

In his dissenting opinion Judge Washington penetrated to this, the crux of the matter, and pointed out that the Walsh-Healey Act has "a restricted objective: that of preventing contractors from cutting wages below prevailing community levels".

Neither the language nor the history of the Act permit the assumption that the Act intends to judge a manufacturer's fitness for Government business by comparing his wages with those of other manufacturers in his industry throughout the whole United States—no matter that this would indeed be the method which would go furthest toward eliminating "low-wage concerns". As Judge Washington concisely emphasizes: "Our function is to determine what Congress thought desirable, rather than to give expression to our own views on social legislation".

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[24] Appendix D, post, p. 33a.

[25] The opinion of the majority suggests that this becomes reductio ad absurdum when it is considered that there may be no other manufacturer of the same type in the locality. The answer in turn to this is that the Secretary has a discretion as to what he will define as a "locality"—though certainly he may not term the entire United States one "locality", as he has undertaken to do in the present case. Moreover, the Statute expressly authorizes him in determining a minimum wage standard to look to "similar industries or groups of industries" in the locality.

The Fair Labor Standards Act[26] is apt example that when Congress desires to set up uniform and Nation-wide wage standards, it is not lacking either in authority or ability to say so. As Judge Washington observes: "Surely it is better to reach decisions of that sort through congressional debate and action, rather than through strained administrative and judicial interpretation of a statute passed years ago for a different and more limited purpose".

It is respectfully submitted that this is a case in which the majority below simply overrode the language of the Statute in order to implement what it conceived to be "the policy of the legislation as a whole"—*notwithstanding that the "locality" wording of the Statute contradicts such a policy and notwithstanding that those who wrote the Statute and procured its enactment expressly and positively declared that such was not its policy.*

As is aptly stated in the concurring opinion of Justice Frankfurter in *Youngstown Sheet and Tube Company, et al.* v. *Sawyer:*

> "It is quite impossible, however, when Congress did specifically address itself to a problem . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between (the executive) and Congress".
>
> *Youngstown Sheet and Tube Company* vs. *Sawyer*, 343 U.S. 579, 609.

[26] 52 Stat. 1060, 29 U.S.C. § 201 et seq.

At one point the opinion of the majority seems to suggest that, by the language of the Statute itself, the "locality" limitation does not apply to all methods of wage determination provided in the Act. The opinion takes no note of the fact that this theory, as long ago as the *Lukens* case, was abandoned by the Secretary of Labor as not comporting "with the statutory language";[27] that the Secretary, as recently as 1952 when the Fulbright Amendment was under consideration, held no such view of the Act;[28] and that certainly, as the legislative history above referred to positively shows, Congress was innocent of any such concept and expressly intended that all wage determinations under the Act should be subject to the "locality" limitation.

Nevertheless, says the majority's opinion, the Secretaries of Labor, purporting to act under this Statute, have "during many years" prescribed uniform minimum wages on a Nation-wide basis for various industries and since this "practice" has been long continued without repudiation, it should not now be interfered with.

As to this it is first to be noted that if a "consistent" administrative practice has been consistently wrong, then "no amount" of it "is binding upon the Courts".[29] Next it must be remembered that prior to the instant case the one and only Court which ever examined the Secretary's practice on the merits, namely the Court

[27] Brief for Secretary of Labor, filed in this Court in *Perkins, et al* v. *Lukens Steel Company, et al*, p. 131.

[28] Hearings on S. 2594, 82nd Cong., 2nd Sess., p. 2475, et seq. 2481 et. seq.

[29] *Texas and Pacific Railway Company* v. *United States*, 289 U.S. 627, 640.

of Appeals for the District of Columbia Circuit, did repudiate it"[30] and that then the doors of the Courts were closed to all review of the matter and have only swung open again with the present case.

To quote again from Judge Washington's opinion: "As far as the argument based on continued administrative interpretation is concerned, I would suppose that we were not entitled to give much weight to action which was until a short time ago completely immune to judicial review".

But, says the opinion of the majority, the Secretary's practice was "called to the attention of committees of Congress", yet Congress wrote no new legislation to require him to change such practice. The committee records vividly show, however, the amazement with which members of Congress, as late as 1950 and 1952, learned that the Secretary was determining minimum wages under the Act on a Nation-wide and not on a locality basis.[31]

And in 1952 Congress did amend the Act specifically to provide that this "practice" which had been immune to court review should instead be subject to court review. In this, Congress was certainly not approving the Secretary's actions. Indeed the Secretary has officially conceded that Congress has "not" seen fit to "affirm the past practices" of the Secretaries

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[30] It will be recalled that the Secretary was repudiated in treating a group of States as a "locality", whereas he has here treated the whole United States as such.

[31] Hearings before subcommittee of House Committee on appropriations. H. R. 6008, 81st Cong., 1st Sess., pp. 69-71. Hearings on S-2594, 82nd Cong., 2nd Sess., pp. 2481-2482, 2706, 2708.

of Labor under the Walsh-Healey Act, but has "left the matter to resolution of the courts".[32]

The Statute Is Clear and Unambiguous

Section 1 (b) of the Walsh-Healey Act is so clear in meaning that he who runs may read it with full understanding. It speaks, not in terms of an entire industry extending over a large area of states or over the whole country, but in terms of a *contract clause*, from the point of view of an accepted contractor, who has a particular place of business where he will manufacture or furnish materials for government purchase: It specifies prevailing minimum wages as determined for "persons employed on similar work . . . in the locality . . ." (cf. *Powell* v. *U.S. Cartridge Co., supra*) or "for persons employed . . . in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished *under said contract*" (emphasis supplied).

This clear meaning is consistent with the legislative history, and is not inconsistent with the statements of the broad policy of the Walsh-Healey Act quoted by the Court of Appeals majority from *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 128 (1940) and *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507 (1942). A differential based on the standard of the local community does not compel the government to deal with "sweat shops." The more recent opinion in *Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497, 515 (1950), states the pol-

[32] Decision by James P. Mitchell, Secretary of Labor—In the Matter of Determination of Prevailing Minimum Wages for the Woolen and Worsted Industry. January 27, 1954. 19 Fed. Reg. 535.

icy of the Act in appropriate perspective, as quoted above.

Nor is the statute absurd, or impossible of administration on a local basis, as asserted in the arguments of Respondents and in the opinion of the Court of Appeals majority. The Bacon-Davis Act[33] has since 1935 required the Secretary of Labor to determine the minimum wages on government construction contracts by local, geographical units described as "city, town, village, or other civil subdivision." Section 6 (c) of the National Industrial Recovery Act[34] gave the President authority to establish codes of maximum hours and minimum wages where agreements could not be obtained and provided that "The President may differentiate according to experience and skill of employees affected and *according to the locality of employment*" (emphasis supplied). With this history of the local standards of minimum wage, it can hardly be said either that Congress did not mean what it said, or that the administration of the Act as written is impossible or even too difficult.

Petitioners respectfully submit that the opinion of the Court of Appeals in *Lukens Steel Co.* v. *Perkins*, 107 F. 2d 627, although reversed on other grounds in this Court, 310 U.S. 113, and the very able dissenting opinion of Judge Washington in this case (Appendix C, post, pp. 19a-21a) dispose of all arguments for the Secretary of Labor's assertion of power to extend a single wage standard across the nation under the Walsh-Healey Act. These opinions demonstrate clearly that his power is limited to localities of lesser

[33] 49 Stat. 1011, 40 U.S.C. § 276a.

[34] June 16, 1933, 48 Stat. 195, 199.

geographical extent. The decision of the Court of Appeals in this case is erroneous and should be reviewed by this Court and reversed.

CONCLUSION

For the reasons and upon the grounds herein set forth, the petitioners pray that a writ of certiorari be granted.

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